ment. The result is that no provision is made against the enforcement of contracts not covering the entire field of competition but yet restricting competition in an unjust and extortionate manner; while contracts of the more extended field though not in any way tending are refused enforcement though reasonable. See *More* v. *Bennett* (1892) 140 Ill. 69.

A recent decision in Kentucky forcibly illustrates the necessity of distinguishing all three classes. *Clemons* v. *Meadows* (1906) 94 S. W. 13. A contract by which one of the only two hotel keepers in a town agreed with his rival not to run his hotel for three years was held unenforceable. The decision seems *prima facie* to be contrary to the early rule that contracts in restraint of trade are enforceable if confined to a particular place. But since the contract is not ancillary to any other, it cannot be upheld as a reasonable contract of Class I. The contract is better, however, treated as one of Class II. Here the point of limited area is not material, and since the contract concerned a quasi-public institution, *People* v. *Chicago etc. Co.* (1889) 130 U. S. 268, 293, and was not shown to be necessary under the circumstances, it is clearly unreasonable and therefore unenforceable. *Anderson* v. *Jett* (1889) 89 Ky. 375; *Chapin* v. *Brown* (1891) 83 Ia. 156. On the other hand, to suppose a reasonable contract of this sort, restricting competition to prevent ruinous results of previous rivalry, there is no doubt that such a contract should be upheld. Yet it is impossible to reach these proper results, if but one classification is adopted for II and III. Under such a classification, contracts of this character, in which the entire field of competition is covered, would necessarily be considered, it would seem, from the same standpoint as those tending toward a true monopoly, and the reasonable contract in the hypothetical case would be condemned together with the unreasonable one in the principal case. On the other hand, if because of this incongruity, it were held that the cases did not fall within the class at all, the contract in the principal case with its unwarranted evil to the consumer would be enforced, except where it could be brought under the narrow theories of Class I, which is wholly inadequate to meet modern exigencies.

FORMER JEOPARDY UNDER INDICTMENTS ERRONEOUSLY HELD INSUFFICIENT FOR VARIANCE.—Where a defendant has been brought to trial on a valid indictment, the panel completed and issue joined, the jeopardy attaches, and any other prosecution for the same offense is barred, unless the defendant waives his right. 1 Bishop, Crim. Law § 978 et. seq. But if there is a material defect in the indictment, *Black* v. *State* (1867) 36 Ga. 447, or a material variance between the indictment and the proof, *State* v. *Stebbins* (1861) 29 Conn. 463, in which case there could be no valid judgment, the defendant is not deemed to have been put in jeopardy. The question arises, what is the effect of arresting judgment, or directing a verdict of acquittal, or quashing the indictment under the erroneous belief that the indictment is invalid or insufficient. It is admitted to be the general rule that the dismissal of the indictment against the objection of the defendant does not deprive him of his right to plead former jeopardy on the second prosecution. *Lee* v.

State (1870) 26 Ark. 260. The question arises where the action is taken on the defendant's motion.

In regard to the motion in arrest of judgment the rule is stated, that where the arrest of judgment is reviewable the defendant cannot be prosecuted on a new indictment, because he is still in jeopardy under the original indictment. To permit a second might subject the defendant to double punishment, if the arrest be reversed. But in states which do not permit a reversal on application of the prosecutor, the arrest is conclusive on the insufficiency of the indictment and the defendant has not been in jeopardy. *State* v. *Yervell* (Tenn. 1820) 2 Yerg. 24; *People* v. *Casborus* (N. Y. 1816) 13 Johns. 350. It would seem that the same principles would apply to a decision of the court quashing an indictment or directing a verdict of acquittal. If a statute allows an appeal by the State, such appeal should be the State's only remedy, and on reversal of an erroneous judgment, the prosecution could be continued on the original indictment. This seems to have been the principle which governed the decision in *People* v. *Casborus*, supra, in which Spencer, J., stated as the ground of his decision—"The effect of arresting a judgment is the same as quashing an indictment * * * and, in this case it appears to me, that as no writ of error could be brought upon the decision of the Court of Sessions arresting the judgment that proceeding is not a bar to any other for the same matter." See also, *Van Rueden* v. *State* (1897) 96 Wis. 671; *Gerard* v. *Illinois* (1842) 4 Ill. 362.

Many courts, abandoning this ground, have adopted a different principle, leading to the same result, even where the sufficiency of the indictment is still open to review. In *Ah King* v. *People* (1875) 5 Hun 297, 300, the court said, that "if the irregularity was not fatal to any conviction, and the prisoner yet insisted upon the defect, * * * that was equivalent to asking for the discharge of the jury and consenting thereto." This decision inclines to the broad view, that in criminal as well as in civil cases, a party will not be allowed to impeach a decision which he himself brought about; and this is the position taken in many cases on this precise point. *U. S.* v. *Jones* (1887) 31 Fed. 725; *Brown* v. *State* (1900) 109 Ga. 570; *People* v. *Meakin* (1891) 61 Hun 327; *Ex parte Winston* (1895) 52 Ala. 419. It is difficult to see how a motion to direct an acquittal is a consent to a discharge of the jury, and a waiver of jeopardy. The courts, to prevent the escape of the defendant from just punishment by "mere technicalities," *Ah King* v. *People*, supra, have established an estoppel against the defendant, in violation, it would seem, of his constitutional privilege.

A recent Kentucky case, repudiating this doctrine of waiver of jeopardy, *Drake* v. *Commonwealth* (1906) 96 S. W. 580, seems illustrative of a tendency to go to the opposite extreme. In the first prosecution, the court had, on defendant's motion, directed a verdict of acquittal for variance, holding the indictment insufficient. Yet the court in the principal case, sitting in an appeal from a second prosecution, held that the defendant had been in jeopardy under the first indictment. In so doing it does not controvert the general rule underlying all the cases, that where the first indictment is insufficient for variance the defendant has not been in jeopardy. Nor does it rely on the exception, noted above,

where the insufficiency of the judgment is open to review. It proceeds upon the ground that the variance, though held to be material in the first prosecution, was in fact immaterial, and that the indictment was therefore sufficient. Regardless of the merits of the question of variance in this particular case, the court seems to have gone to great lengths in assuming the right to reopen the point of its materiality. If a variance previously held material may in a second prosecution be declared immaterial, no reason appears why a variance previously held immaterial may not, in the same way, be declared material, so as to allow a second prosecution on the same offense for which the defendant has already been convicted and punished. The result is to make the outcome of the first prosecution, though not appealed from, practically inconclusive, and to leave the question of jeopardy an open one even where an appeal by the State is not allowed.

EFFECT OF PARDON ON DIVORCE FOR CONVICTION OF CRIME.—The pardoning power in the United States, though it rests upon constitutional provision as an independent foundation, *Ex parte Wells* (1855) 18 How. 307, must be considered in the light of English history and the earlier cases. *U. S.* v. *Wilson* (1833) 7 Pet. 150. These sources throw more light upon the scope and proper exercise of the power than upon its precise effect; but it is apparent that it results in more than a mere cessation of imprisonment. The pardoned man is no longer a criminal, and a designation of him as such is slanderous. Bac. Abridg., "Pardon" [h]; *Cuddington* v. *Wilkins* (1615) Hob. 81. His fines cannot be collected, *Shoop* v. *Commonwealth* (1846) 3 Pa. 126, and his disabilities, consequent to conviction, are removed, as in restoring the right to vote, *Jones* v. *Board* (1879) 56 Miss. 766; *Wood* v. *Fitzgerald* (1870) 3 Ore. 568, or to hold office, *Hildreth* v. *Heath* (1878) 1 Ill. App. 82, or to be a witness, *Rex* v. *Crosby* (1695) 2 Salk. 689; *State* v. *Foley* (1880) 15 Nev. 64, though as to the last, under certain statutory provisions as to perjury, pardon is ineffectual, the incapacity being regarded as a rule of evidence and not a disability. *Houghtaling* v. *Kilderhouse* (N. Y. 1851) 1 Park. C. C. 241. The pardon "releases the punishment and blots out the existence of the guilt. * * * It makes him a new man with a new credit and capacity." *Ex parte Garland* (1866) 4 Wall. 333.

The retrospective effect of a pardon is less complete, though the decisions are not in entire harmony on the point. A pardon does not "make amends for the past. It affords no relief for what has been suffered." *Knote* v. *U. S.* (1877) 95 U. S. 149. It cannot obliterate the crime as an indication of moral character, *In re Spencer* (1878) 5 Sawy. 195; *Sanborn* v. *Kimball* (1875) 64 Me. 140, or as affecting credibility as a witness. See 11 Am. Jur. 356. Nor, it seems, is the fact of the crime itself gainsaid, in all cases. It is lawful to say of a pardoned thief, "you were a thief," *Baum* v. *Clause* (N. Y. 1843) 5 Hill 196, though the fact of conviction cannot be used as a basis of disbarment, *Scott* v. *State* (1894) 6 Tex. Civ. App. 343, or of an increased sentence for "second offense," *Edwards* v. *Commonwealth* (1883) 78 Va. 39. At any rate it is clearly settled that a pardon cannot affect rights which "have been